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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 497

EMIGRANT INDUSTRIAL SAVINGS BANK,
Petitioner,

—against—

R. ALBERT BALDWIN, STEPHEN HANNAN, JAMES TULLY, JOHN ALBAMEIN, PHILIP FINKELSTEIN, ALFRED E. ROBINSON, PAUL RICHARD SCI, GEORGE CARTY, EMANUEL BALZAN and CHARLES KING,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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R. ALBERT BALDWIN, STEPHEN HANNAN, JAMES TULLY, JOHN ALBAMEIN, PHILIP FINKELSTEIN, ALFRED E. ROBINSON, PAUL RICHARD SCI, GEORGE CARTY, EMANUEL BALZAN and CHARLES KING,

Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Emigrant Industrial Savings Bank, respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner prays for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which held that respondents, elevator operators, porter, watchmen and firemen, employed by the petitioner in its office and showroom building at 444 Fourth Avenue, in the City of New York, were engaged in the production of goods for commerce within the meaning of §7(a) of the Fair Labor Standards Act of 1938 [29 U. S. C.

§207(a)] and, therefore, were entitled to overtime compensation, liquidated damages and counsel fees under said Act (R. 208-212).

Said decision was made in reversing a judgment of the United States District Court for the Southern District of New York which dismissed respondents' complaint on the merits (R. 203) based, primarily, upon a finding that:

> "4. There was no manufacturing or processing of any kind carried on at said building. With minor exceptions the building was used by tenants for offices and show rooms" (R. 190).

The Second Circuit held that since this Court did not "in express terms" state in *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227 (reversing 2nd Cir., 146 F. 2d 438) decided June 11th, 1945, "what proportion of the total rentable area would be considered a substantial amount" in determining whether a building is devoted to the production of goods for commerce, it was necessary to examine the activity of each office tenant herein to determine whether it was engaged in physical production of goods for commerce and that if 20% of the space was devoted to such activity, maintenance workers of the building were covered by the Fair Labor Standards Act (R. 210).

This despite the fact that *no manufacturing* (in the usual and accepted sense) was carried on in the building and its owner was a local savings bank and not an interstate producer,—and despite this Court's ruling in the *10 East 40th Street* case that the operation and maintenance of such a building is a "local activity"* which Congress did not include within the coverage of the Act.

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* "Renting office space in a building exclusively set aside for any unrestricted variety of office work spontaneously satisfies the common understanding of what is a local business and makes the employees of such a building engaged in local business * * *.

[Footnote continued on following page.]

Thus, respondents were held covered by the Act because in excess of 20% of the building was occupied by one tenant* who multigraphs letters, another who does editorial work on publications elsewhere printed, and four tenants engaged in manufacturing activities outside of the building, who "receive some of the finished products at the premises, where they repack them or at least put new addresses on old packages" (R. 210-211).

These six tenants were held to be engaged in "physical" production, and respondents entitled to recover in this action on the theory that their maintenance work was, within the meaning of said Act, "necessary" to such production.

In arriving at its conclusion that the four tenants who repacked or readdressed old packages of finished goods were engaged in "physical" production, the Circuit Court interpreted this Court's definition of "handling" in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 503, to mean

> "that if an employee handles goods merely for a distributor or transporter he is not engaged in production; but if he does so for a manufacturer (in his office) he is engaged in production" (R. 211-212).

[Footnote continued from preceding page.]

Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods * * *. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory powers of the states which Congress saw fit to reserve to them" (*10 East 40th Street Building, Inc.* v. *Callus, supra*).

* There were thirty-five tenants in all (R. 183-185).

Opinions Below.

The Circuit Court of Appeals wrote an opinion (R. 208) which is reported in 150 F. 2nd 524. The opinion of District Judge J. Foster Symes (R. 186-194) is unreported.

Facts.

The facts are not in dispute. Petitioner is a New York savings bank which owned and operated a thirteen story multi-tenanted office and show room building at 444 Fourth Avenue in New York City (R. 5). It was rented to 35 tenants (R. 183-185).

Respondents were passenger elevator operators, a freight elevator operator, a porter, a relief elevator operator, watchmen and firemen (R. 209). The building was occupied by a substantial number of tenants for offices, store rooms and show rooms, who "took orders for goods manufactured elsewhere and sold them to customers within and without the state" (R. 209).

No manufacturing in its usual and accepted sense was carried on in the building (R. 190).

Using the approach employed in *Callus* v. *10 East 40th Street Building, Inc.*, 146 F. 2d 438, reversed 65 S. Ct. 1227, the Circuit Court of Appeals found that among the thirty-five tenancies of this large office building, with a rentable area of 57,506 square feet, 22,639 square feet "or roughly 39½%, is occupied by tenants engaged in producing goods on the premises" as follows:

(a) A publicity and advertising concern mimeographs letters which eventually* are mailed across State lines

* This tenant had only two customers out of the State. One ordered $25.16 in 1939 and there were but two orders of $27 and $73.34 in 1940 for both customers (R. 57-58). This tenant testified that "except for this infinitesimally small amount of business * * * (his) business was strictly a local business" (R. 58).

and "uses five multigraphs, one mimeograph and one type setter machines". This tenant occupies 2,000 square feet (R. 210).

(b) A book publisher and jobber, who uses his offices for "reading, editing and preparing of manuscripts for the printer" with the printing "done elsewhere" and whose books are distributed from the premises, occupies 6,195 square feet (R. 211).

(c) Four tenants, elsewhere engaged in manufacturing, who

> "receive some of the finished products at the premises, where they repack them or at least put new addresses on old packages, in order to ship them to customers, of whom a substantial number are located outside the state."

These four tenants occupy 14,444 square feet (R. 211).

None of the tenants listed under "(c)" engaged in the actual manufacturing of goods in the building. The Court below, however, held that the repacking or re-addressing of old packages of "finished goods" constituted "handling" as that term is used in Section 3(j) [29 U. S. C. §203(j)] of the Fair Labor Standards Act.

In reaching this conclusion, *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 503, was interpreted to hold that if a distributor or wholesaler handles packages of goods, he is not a producer, but if a manufacturer or his employees handles packages in his office, he is engaged in production and in furthering "the manufacturing process by direct work upon the goods" (R. 211-212).

The tenant "(a)" and the publisher "(b)" together occupied 8,195 square feet, which is less than 15% of the total rentable area. Thus, if the Circuit Court's 20% test of substantiality (which it applied in this case as it

did in the *10 East 40th Street* case) were correct, its decision must find support, if any, in the correctness of its ruling that the four "(c)" tenants who repacked or readdressed old packages of "finished goods" were thereby engaged in manufacturing.

The petitioner filed a petition for rehearing in the Circuit Court and urged that its decision in this case is in conflict with this Court's ruling in *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227, and is based upon a misinterpretation of *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490 (R. 215). Said petition was denied without opinion (R. 224).

The order for mandate was entered herein by the Second Circuit Court of Appeals on the 12th day of July 1945 and the mandate has been stayed and withheld, pursuant to stipulations of the parties and orders entered thereon, signed by Judge Augustus N. Hand and Judge Jerome Frank of said Court. Said orders have stayed and withheld the issuance of the mandate until the 11th day of October, 1945, pending the filing of this petition for a writ of certiorari to said Court.

Jurisdictional Statement.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Question Presented.

On the basis of the foregoing, petitioner desires this Court to review the following question:

Whether the work of the respondents in maintaining a multi-tenanted office and show room building—not a manu-

facturing building—owned and operated by a savings bank—not itself an interstate producer—was "necessary to the production of goods" for commerce within the meaning of the Fair Labor Standards Act by reason of the fact that among the thirty-five office tenants of the building, one tenant multigraphed letters, another did editorial work and four manufacturing companies, elsewhere carrying on their manufacturing activities, received and repacked or readdressed old packages of "finished goods".

Reasons Relied on for Granting the Writ.

This Court is requested to grant the Writ for the following reasons:

1. The decision of the Circuit Court of Appeals herein is in direct conflict with the decision in *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227, decided June 11th, 1945.

2. The decision herein is based upon a misunderstanding and misconstruction of the definition of "handling" in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490.

3. The decision of the Circuit Court of Appeals herein is in direct conflict with numerous decisions of State and Federal courts.

4. Though this Court reversed the Circuit Court in the *10 East 40th Street* case and held that in a case involving maintenance workers of an office building,—not owned and operated by an interstate manufacturer,—the application of a percentage test of substantiality in determining coverage was unnecessary, the Circuit Court of Appeals in this and other cases has indicated that it is necessary for this Court directly to pass upon the Circuit Court's 20% test of substantiality.

5. The decision herein should be reviewed because of the importance of the questions involved. As pointed out in the *10 East 40th Street* case, the courts have been "plagued" with numerous cases involving the application of the Fair Labor Standards Act to building maintenance workers. Unless the decision of the Court below is reversed, there will be continued confusion and the courts will continue to be plagued with numerous cases of this type. The decision of this Court in the *10 East 40th Street* case seemingly disposed of the legal questions involved in this type of case and drew lines which were to serve as a guide in other cases. But these lines have been completely obliterated by the decision of the Court below.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., October 10, 1945.

JOSEPH M. PROSKAUER,
Counsel for Petitioner.

Harold H. Levin,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the District Court is not reported (R. 186-194).

The opinion of the 2nd Circuit Court of Appeals (R. 208) is reported in 150 F. 2nd 524.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3rd, 1891, c. 517,

Sec. 6, 26 Stat. 828; Act of March 3rd, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13th, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Statement of Case.

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

Relevant Provisions of Statute Involved.

Fair Labor Standards Act of 1938—(Act of June 25th, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Secs. 201-219).

"Sec. 3. As used in this Act—

* * * *

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" [29 U. S. C. §203(b).]

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." [29 U. S. C. §203(j).]

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours

during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." [29 U. S. C. §207(a).]

Sec. 16(b):

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." [29 U. S. C. §216(b).]

Specification of Errors.

The Second Circuit Court of Appeals erred as follows:

1. In holding that the work of respondents in maintaining this (non-manufacturing) office and show room

building, not owned or operated by a manufacturer, constituted the production of goods for commerce merely because the building housed among thirty-five tenants, one doing advertising work, another doing editorial work on publications, elsewhere printed, and four others, engaged *elsewhere* in manufacturing, who received and repacked or readdressed old packages of "finished goods" at their offices in the building.

2. In holding that preparing advertising and editorial work on publications elsewhere printed and repacking or readdressing packages of "finished goods" constituted "manufacturing" as that term is used in *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227.

3. In holding that repacking or readdressing old packages of *finished goods* constituted "handling" and, therefore, the production of goods for commerce as the term "handling" is used in Section 3(j) [29 U. S. C. §203(j)].

4. In applying the 20% test of substantiality in determining whether respondents, in maintaining this office and show room building, were engaged in the production of goods for commerce within the meaning of said Act.

Summary of This Court's Rulings in Building Maintenance Workers' Cases.

The question of the Fair Labor Standards Act's coverage of building maintenance workers has been considered by this Court in three cases. *Kirschbaum* v. *Walling*, 316 U. S. 517, decided June 1st, 1942; *The Borden Company* v. *Borella*, 65 S. Ct. 1223, decided June 11th, 1945; and *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227, decided June 11th, 1945.

In the *Kirschbaum* case, this Court held that maintenance workers of buildings principally devoted to manu-

facturing, who brought raw materials to and carried away finished goods from tenants' premises, who cleaned the factory premises and otherwise maintained factory buildings, had a sufficiently "close and immediate tie" with the process of production of goods for commerce to be "necessary" to such production within the meaning of the Fair Labor Standards Act.

In *The Borden Company* case, this Court held that where a manufacturer owns, operates and occupies a large proportion of an office building, from which its manufacturing enterprise is managed and controlled, its maintenance employees are an integral part of and "necessary" to its manufacturing activities and thus are covered by the Act.

In the *10 East 40th Street Building, Inc.* case, this Court held that the maintenance of a multi-tenanted office building not "principally devoted" to manufacturing in the usual sense but devoted to an unrestricted variety of office work is "too many steps removed from the physical process of the production of goods", that such remoteness is insulated from the Fair Labor Standards Act because Congress chose not to include "predominantly local situations within the confines of the Act", and that, in view of the Act's provisions, it was improper to call such maintenance workers producers of goods

> "because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises."

Argument.

POINT I.

The decision for which review is sought is in direct conflict with this Court's holding in *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227.

The decision in this case is grounded upon the Circuit Court's finding that one tenant gets out advertising material and does multigraphing work, another does editorial work on publications, elsewhere printed, and that four other tenants repack or readdress "old packages of finished goods", the total area occupied by these six tenants constituting more than 20% of the area of the building herein.

The approach thus employed is exactly the same as the one used by the Court below in *Callus* v. *10 East 40th Street Building, Inc.*, 146 F. 2d 438.

But this court reversed (65 S. Ct. 1227) and held that maintenance employees of that multi-tenanted office building were not covered by the Act.

After pointing out that the courts had been plagued with problems in connection with employees of buildings occupied by those having

> "at least some relation to goods that eventually find their way into interstate commerce",

Mr. Justice Frankfurter, writing for a majority of this Court, said:

> "Petitioner owns and manages a 48-story New York office building. The offices are leased to more than a hundred tenants pursuing a great variety of enterprises including executive and sales offices of manufacturing and mining concerns, sales agencies repre-

senting such concerns, engineering and construction firms, advertising and publicity agencies, law firms, investment and credit organizations and the United States Employment Service. The distribution of occupancy in relation to the ultimate enterprises of the different groups of tenants was the subject of conflicting testimony and interpretation, but in our view does not call for particularization. Indisputably, the building is devoted exclusively to offices, and no manufacturing is carried on within it.

* * * *

Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act.

* * * *

But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices *has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer.* And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts.

* * * *

> It is not merely a reasonable distinction but one appropriate to the subject matter to hold that where occupations form part of a distinctive enterprise, such as the enterprise of running an office building, they are properly to be treated as distinct from those necessary parts of a commercial process which alone, with due regard to local regulations, Congress dealt with in the Fair Labor Standards Act." (Emphasis ours.)

In attempting to distinguish the *10 East 40th Street* case, the Circuit Court said with respect to the tenant who prepared advertising material and the one who did editorial work on publications, elsewhere printed,

> "these (two) concerns * * * clearly manufacture goods on the premises."

It held also that the tenants who repacked or re-addressed old packages of *finished goods* were likewise engaged in manufacturing in that they "further the manufacturing process".

But, when Mr. Justice Frankfurter stated that "no manufacturing is carried on within" the 10 East 40th Street building, he indicated that he did not regard these activities as constituting manufacturing.

This may be seen from the resumé of some of the activities carried on in the 10 East 40th Street building which appears in the dissenting opinion of Mr. Justice Murphy:

> "* * * the building is occupied by concerns engaged in writing and preparing mimeographed, photographic and printed matter which is shipped in interstate commerce. One company produces between 15,000 and 20,000 pages of mimeographed materials per week, 90% of which is sent outside the state. Another tenant produces 60 magazines having national circulations. Other concerns produce large quantities

of pamphlets, photographs, magazines and advertising matter for interstate shipment."

As to the tenants who repacked or readdressed old packages of "finished goods", from what appears in the record in the *10 East 40th Street* case it is obvious that this Court did not consider *such* activities as constituting manufacturing.

Thus, the 10 East 40th Street building housed an office of General Motors Corporation, where automotive parts were received, repacked or readdressed and whence they were shipped to customers throughout the country. Also, photographic and printed matter was received at and shipped from that building by manufacturers such as Eastman Kodak Company, Cluett, Peabody and Co., and others.

If there was "no manufacturing" carried on in the 10 East 40th Street office building, there was no manufacturing carried on at 444 Fourth Avenue, the office building involved in this case.

Since the multi-tenanted office and show room building herein was not occupied by tenants engaged in *manufacturing in the building* and since it was not owned and operated by an *interstate manufacturer* having offices in the building, it was, in all essential respects, similar to the 10 East 40th Street building.

Therefore, the decision of the Circuit Court in this case, which reached a conclusion, contrary to the one reached by this Court in the *10 East 40th Street Building* case, is erroneous and should be reversed.

POINT II.

The Circuit Court's decision herein is based upon a misunderstanding and a misconstruction of the definition of "handling * * * or in any other manner working on such goods" in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490.

Section 3(j) of the Fair Labor Standards Act defines "produced" as follows:

> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" [29 U. S. C., Sec. 203(j)].

The Circuit Court of Appeals states that the four tenants occupying 14,444 square feet, or 25+% (of the 39½% held to be devoted to production) of the available space in the building received.

> "some of the finished products at the premises, where they repack them or at least put new addresses on old packages, in order to ship them to customers."

These were held to be engaged in the production of goods for commerce because they were engaged in "handling" such "finished goods" (R. 211). Since the two tenants who did advertising and editorial work occupied less than 15% of the available space, if the Circuit Court's 20% test of substantiality is a correct one, its decision is untenable, unless the tenants who "handled"

packages were thus engaged in the (physical) production of goods for commerce within the meaning of said Act.

In *Lenroot* v. *Western Union Telegraph Co.*, 141 F. 2d 400, the 2nd Circuit held that the "handling" of messages by the telegraph company constituted production of goods for commerce. That ruling was reversed in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, where this Court clearly defined "handling" as used in the Fair Labor Standards Act to refer to handling in connection with manufacturing and in putting the product "in a state to enter commerce". Mr. Justice Jackson, writing for the majority, says, in that case:

> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on.' These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce."

After thus restricting the application of "handling" to handling goods in connection with their manufacture, Mr. Justice Jackson says:

> "If we go beyond this (the inclusion of 'every kind of incidental operation preparatory to putting goods into the stream of commerce') and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended. * * * Section 15(a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour provisions. But it makes this exception: 'except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier.*' (Italics supplied.) This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is as if it read 'the Act shall impose no liability on a common carrier for carrying goods that it does not carry.' One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that 'produced' means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation. Its artificial definition, if construed to mean that 'handling' and 'worked on' catches up into the category of production every step in putting the subject of commerce in a state to enter commerce, is a sensible and useful one, not at odds with any other section of the Act. We think the Government

> has not established its contention that the Western Union is a 'producer' of telegraph messages."

The Circuit Court of Appeals grudgingly concedes that in view of this Court's opinion in the *Western Union* case, the mere addressing of a package does not constitute either manufacturing or production, but this concession is limited to such activity on the part of a distributor or a wholesaler:

> "it seems that if an employee handles goods merely for a distributor or transporter, he is not engaged in production; but if he does so for a manufacturer (at a manufacturer's office), he is engaged in production" (R. 211-212).

As we understand the language of the *Western Union* opinion, this distinction which is based not on differences between work performed but differences between persons for whom the work is done is wholly erroneous.

As Mr. Justice Jackson put it, "handling" and "worked on" cover

> "every step in putting the subject of commerce *in a state* to enter commerce." (Emphasis ours.)

When the tenants here received "finished goods" and merely repacked them or readdressed old packages, the products were already "in a state to enter commerce".

Candy is manufactured and unless sold in bulk is packaged. Such packaging is part of the physical process of production. Cereals are manufactured and before the cereal can be marketed it must be "packaged" in boxes.

Medicines and other liquids are manufactured, but before the product is ready to be distributed in commerce, it must be bottled. And so, after mentioning

"packaging", Mr. Justice Jackson speaks of one "who bottles the liquid or labels".

It would seem clear, therefore, that "packaging", bottling or labelling, incidental to preparing for shipment refers to all of the activities necessary to the completion of "finished products". Such work is entirely different from repacking or readdressing an old package of "*finished goods*" previously "packaged" at the factory.

Such a construction makes it unnecessary to interpret Mr. Justice Jackson's opinion as holding that one is engaged in "handling" and physical production depending upon who employs him.

In *Blumenthal* v. *Girard Trust Co.*, 141 F. 2d 849, the 3rd Circuit, in dealing with the contention that the receipt and shipment of automobile parts constituted production, said:

> "Under the present facts the manufacture of the automotive parts had been concluded prior to the parts being received by the tenant at all. There was nothing he did with them, that rendered them any more complete or that was intended to be an operation necessary to their final development. He merely wrapped and mailed out the merchandise in exactly the same condition as it was when turned over to him. He was in no way connected with the process of production of the automotive parts themselves."

Thus, even if the ruling in *10 East 40th Street Building, Inc.* v. *Callus*, *supra*, did not require an affirmance of the Trial Court because the office building herein was not used for manufacturing and was not owned by a manufacturer, the decision of the Circuit Court would have to be reversed because tenants who repack or at least readdress and ship old packages of "finished goods", though engaged in commerce, are not engaged in the "production of goods

for commerce" within the meaning of the Fair Labor Standards Act.

POINT III.

Review should be granted because, despite the seemingly clear disapproval of the application of the twenty per cent. test of substantiality in the *10 East 40th Street* case, the Circuit Court of Appeals held that such test must still be applied in the absence of a statement by this Court "in express terms".

As already indicated, the Circuit Court in this case used exactly the same approach in determining this case as it did in *Callus* v. *10 East 40th Street Building, Inc.*, 146 F. 2d 438. It considered the activity of each tenant and having reached the conclusion that more than 20% of the space was occupied by what the Circuit Court considered physical producers of goods, the maintenance workers were held necessary to such production and, therefore, covered by the Act.

In reversing *10 East 40th Street Building, Inc.* v. *Callus*, 65 S. Ct. 1227, this Court made it clear that in dealing with an office building "housing all the usual miscellany of offices",—not owned and operated by a manufacturer—there was no need for "particularization" or "meticulous calculation" to determine percent of space used for one office purpose or another.

Such disapproval expressed in general language has not satisfied the Circuit Court of Appeals, as indicated not only by what is said in its opinion in this case, but in a subsequent opinion.

In this case, the Circuit Court said:

"In *Callus* v. *10 East Fortieth Street Building, Inc.*,

2 Cir., 146 F. 2d 438, this court interpreted the *Kirschbaum* case to imply coverage of maintenance employees of a building of which more than 20 per cent was devoted largely to miscellaneous offices of manufacturers. We adopted the figure of 20 per cent because it was the reasonable standard fixed by the Administrator. But the Supreme Court reversed * * *. What proportion of the total rentable area would be considered a substantial amount is not stated in express terms. The dissenting Justices did refer to the Administrator's standard, saying, however, that whether 20 per cent occupancy was a reasonable minimum was not in issue, since the 32.5 per cent occupancy for production was clearly so substantial as to remove any doubt. There seems to us, therefore, no reason to withdraw our approval of the Administrator's conclusion * * *."

The Circuit Court employed similar language, in (apparently) asking for an authoritative decision on this point, in *Salvatore Gangi* v. *D. A. Schulte, Inc.*, 150 F. 2d 694, decided July 20th, 1945:

"In *Callus* v. *10 East Fortieth St. Bldg., Inc.* (2 Cir., 146 F., 2d, 438), this court applied the principle of the *Kirschbaum* case to uphold the administrator's standard that building maintenance employees are within the protection of the act when more than 20 per cent. of the building is occupied by tenants engaged in the production of goods for interstate commerce. Though the Supreme Court reversed this decision in *10 East 40th St. Bldg., Inc.* v. *Callus* (65 S. Ct., 1227)—on the ground that the building there was actually occupied for offices and not for manufacturing, even though some of them were administrative offices of interstate producers—it did not discuss or repudiate the administrator's standard. Hence in *Baldwin* v. *Emigrant Indus. Sav. Bank* (2 Cir., July

12, 1945), we concluded that the standard was still reasonable and applicable."

Even before this Court's reversal in the *10 East 40th Street* case, the 2nd Circuit expressed its own doubts as to the propriety of applying this rigid percentage test, adopted by the Wage & Hour Administrator on November 19th, 1943,* five years after the enactment of the Statute under consideration.

In *Fleming, et al.* v. *Post, etc.*, 146 F. 2d 441, decided December 14th, 1944, after referring to its prior application of the 20% test of substantiality, the Second Circuit said:

"In deciding which of the occupants may be considered as engaged in the production of goods for interstate commerce, where any of them is so engaged but also in production for intrastate commerce, we are again faced with the necessity of discovering a quantitative standard. On this question we have no interpretation by the Administrator to assist us. The Supreme Court has indicated only that the tenants must be 'substantially' engaged in the production of goods for interstate commerce. *Walton* v. *Southern Package Corp.*, 320 U. S. 540. Once again we equate the term 'substantial' with the figure of 20%. We fully appreciate that under these criteria it is possible (although not so in this case) for building employees to be brought under the Act when but 4% of the activity of all the tenants may be categorized as production of goods for interstate commerce. But we feel that the decisions of the Supreme Court indicate such a result, and we must follow what seem to us the implications of these decisions; 'we are merely a reflector, serving as a judicial moon'."

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* See *Callus* v. *10 East 40th Street Bldg., Inc.*, 146 F. 2d. 438, 440.

Upon further analysis, the 4% figure may be further reduced by reason of the fact that only a fraction of a tenant's activities may constitute production.

Thus, where a building is occupied to the extent of 20% by those engaged to the extent of 20% in production of which 20% is shipped in interstate commerce, the ultimate percentage would be .8%.

Therefore, review by this Court is necessary to settle this question in "express terms" so that the courts, including the 2nd Circuit, will clearly understand, first, whether any percentage test is necessary in dealing with a multi-tenanted office (non-manufacturing) building not owned by a manufacturer and, second, if a test of substantiality is necessary, whether the Administrator's 20% test is reasonable and proper or whether a less rigid one should be adopted in its stead.

POINT IV.

The decision herein should be reviewed because of the importance of the questions involved. Unless the Circuit Court's decision in this case is reversed, the clear lines drawn in the *10 East 40th Street* case will be obliterated and the courts will be "plagued" with more hundreds of cases by reason of the uncertainty of the Fair Labor Standards Act's application to building maintenance workers.

When the first of the building service cases reached this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, Mr. Justice Frankfurter pointed out that it would be necessary to draw lines and that these lines would have to be defined by "the gradual process of inclusion and exclusion".

Such lines have now been drawn in the *Kirschbaum*, *The Borden Company* and the *10 East 40th Street* cases.

As a result, building service workers have been divided into three classes:

First, those who work in real factory buildings, even though multi-tenanted, such as involved in the *Kirschbaum* case;

Second, those who are employed by a manufacturer, such as the Borden Company, in the manufacturer's own office building, from which its manufacturing enterprises are directed and controlled, thus making it an integral part of and an adjunct to the employer's manufacturing enterprise.

These two classes of maintenance employees were held to be covered by the Act;

Third, those who maintain an ordinary office building, such as the 10 East 40th Street Building.* There, there is no manufacturing at all in the usual sense. By a strained legalism, some tenants may be found to be technically engaged in a remote step in the chain of pro-

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* In reversing the Court below in the *10 East 40th Street* case, this Court reaffirmed what was held in a host of other cases. To mention only those left undisturbed by denial of certiorari:

Johnson, et al. v. *Dallas Downtown Development Co.*, 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;
Stoike v. *First National Bank of New York*, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11, 1943;
Tate v. *Empire Building Corp.*, 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11, 1943;
Johnson v. *Masonic Building Co.*, D. C. Ga., 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28, 1944;
Rucker, et al. v. *First National Bank of Miami, Okla.*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31, 1944;
Rosenberg (*Lorenzetti*) v. *Semaria*, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18, 1943;
Convey v. *Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6, 1944;
Green v. *Anchor Mills Co.*, 224 N. C. 714, cert. den. —— U. S. ——, April 23, 1945.

duction or in activities incidental to production carried on elsewhere. The servicing of such a building, with its variety of office work, was held too remote from the actual physical production to make the maintenance activities "necessary" to such production.

Except for the decision below, there would thus be no difficulty for a court to determine whether the workers of a given building are covered by the Fair Labor Standards Act. However, unless the decision herein is reviewed by this Court, the lines previously drawn will have been completely obliterated and owners, employees and Judges will be faced with the necessity of peering into the activities of each tenant of a multi-tenanted office building to determine whether, in any given work-week, a given tenant is to the extent of 20% engaged in the production of goods, whether 20% of such goods are shipped in interstate commerce and, finally, whether 20% of the space of the building is occupied by such tenants.

Bearing in mind this Court's injunction in *Addison* v. *Holly Hill Products, Inc.*, 322 U. S. 607, that the language of this statute must

> "be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him".

the decisions in the three building maintenance workers cases provide not only an easier approach to a determination but also a fairer one.

The owner of a factory building may reasonably be expected to understand that his building service employees are necessary to the physical production activities carried on in his building. The employer engaged in a manufacturing enterprise who employs maintenance workers for a building housing his management staff would also understand that his service employees in common with

his other employees are necessary to his manufacturing enterprise.

But the owner of a multi-tenanted *office* building with a variety of tenancies, changing from time to time, could not be expected to understand that his building service employees in operating such a building would be considered necessary to the process of producing goods for commerce because some tenants, at one time or another, might elsewhere be engaged in manufacturing.

CONCLUSION.

It is respectfully requested that a petition for certiorari in this case should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 497

EMIGRANT INDUSTRIAL SAVINGS BANK,

Petitioner,

against

R. ALBERT BALDWIN, STEPHEN HANNAN, JAMES TULLY, JOHN ALBAMEIN, PHILIP FINKELSTEIN, ALFRED E. ROBINSON, PAUL RICHARD SCI, GEORGE CARTY, EMANUEL BALZAN and CHARLES KING,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for ~~Petitioner.~~ Respondent.

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OCTOBER TERM, 1945.

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EMIGRANT INDUSTRIAL SAVINGS BANK,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court (R. 186-194) has not been officially reported. It appears unofficially in 7 Wage Hour Rept. 831. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 208) has been reported in 150 F. (2d) 524.

Jurisdiction

Jurisdiction has been invoked under Section 240 of the Judicial Code, as amended (Act of March 3rd, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3rd, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13th, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Statement

Since petitioner's summary of facts in the petition is argumentative, conclusory and hardly adequate, and there is no statement of the case in the brief in support of the petition, respondents present the following summary statement.

During the period involved in this suit, plaintiffs furnished and maintained various services and facilities for the use and benefit of some 35 tenants in a 13-story building used to a substantial extent for processing and warehousing purposes and classified, from the standpoint of wage payments to respondents under collective bargaining agreements, as a *"loft building"*. Included among the facilities maintained were heat and hot water, elevator service, watch patrol and various other duties essential to the maintenance of clean, safe and habitable working quarters (Pl. Ex. 7, R. 183-185; 16-21; 143-144).

The testimony indicated clearly the nature of the building as a warehouse and manufacturing building:

> 1. *Daniel Brothers, Inc.* This tenant occupying an entire floor, purchased yarns from suppliers in various states and stored them and distributed them to customers throughout the United States (R. 34). All purchases were for stock and the goods were then sold from stock (R. 39, 46). The yarns were procured in case lots from suppliers and reshipment was also in case lots (R. 35). About 1,000 cases a year moved out of the building to this tenant's customers (R. 36). Supplies were received every few days and shipments were made every working day (R. 38). The yarns were tested by hand and sampling was performed by machine (R. 36). About 66⅔% of the goods sold were shipped to customers outside of the State of New York, of an estimated annual volume of between $500,000 and $1,000,000 (R. 36).

2. *Heitzmann & Stallberg.* This importer and manufacturers' agent represented mills, dye-houses and finishing plants, dealing in nettings and textiles (R. 45-46). Goods were sent from textile mills to dyeing or finishing plants pursuant to instructions from the tenant with respect to the dyeing and finishing work to be done (R. 47-48). All of the mills and finishing plants were outside of New York State (R. 46). The firm did an annual business of about $100,000; the average perpetual value of inventory maintained here was approximately $25,000, but all of the annual volume eventually passed through the premises, being previously stored at the finishing plants awaiting dyeing instructions (R. 37, 46, 48).

The goods as received from suppliers were sorted and "put back into different cartons or packages" for distribution (R. 50). Some goods were placed on shelves and orders subsequently filled by picking from stock (R. 51). Merchandise was packaged, graded and boxed in the building (R. 50). Sales to customers outside New York State approximated 50% to 66⅔% of the annual volume of $100,000 (R. 49).

3. *Hoover Processed Letters, Inc.* This firm used rented space for its direct mail advertising business (R. 52) consisting of the reproduction of advertising matter publicizing products of customers of the tenant (R. 52-53). For the work of preparing "mimeographed forms and processing letters" the tenant used 5 multigraphs, 1 mimeograph and 1 "type-setter for setting the type" (R. 52). Raw paper was purchased in case lots and cut to letter size on the premises (R. 54). The letterheads on which advertising matter was reproduced for customers were printed by multigraph process on paper purchased in large lots and cut to size here by the tenant (R. 55).

Approximately one million pieces of advertising matter were turned out annually (R. 53, 56) of which about 100,000 moved out from the premises to ad-

dressees in various parts of the United States (R. 53) and 900,000 were returned to customers who did the addressing, inserting, sealing and stamping themselves (R. 53, 56). Most of the work of this tenant was for the well-known nationally-circulated weekly magazine NEWSWEEK and the letters reproduced for that customer were for subsequent distribution through the mails to its various subscribers and prospects (R. 56). As judicially noticed, NEWSWEEK is a magazine of wide general circulation and, as addressed and mailed by the magazine publisher, letters multigraphed on the premises were subsequently sent all over the United States (R. 59).

4. *Bernson Silk Mills.* This tenant for virtually the entire period was a textile manufacturer with a mill in Virginia where fabrics were woven to order and maintained warehouse space at 444 Fourth Avenue (R. 61-62).

Yarns were purchased, received at the company's mill in Virginia, woven into fabrics, sent out to dyeing and finishing plants in New Jersey, then forwarded to 444 Fourth Avenue to be stored and shipped to customers all over the country from there (R. 62-64). Bins were maintained to hold the piece goods awaiting orders (R. 67) but the goods moved rapidly through the premises: "They may only stay one afternoon and they may stay overnight" and "as fast as they can be allocated to certain customers and packed and shipped, they are released to those customers" (R. 67). The total volume of sales of the company through here was in excess of $900,000 per year, of which between 67% and 81% was actually physically received at and shipped from the building to the tenant manufacturer's customers throughout the United States (R. 64-65, 71). In excess of $340,000 worth of goods were shipped to this building and reshipped from there to customers outside the State of New York each year, constituting about 50% of the goods physically handled here (R. 65-66, 71). This volume of interstate shipments from here constituted some 38% of the manufacturer's entire annual output (R. 71).

A measuring and examining machine, operated by electricity, was regularly used by the tenant manufacturer to measure the length of the bolt and provide an opportunity to inspect the goods for flaws and defects in fabric design or color while running through the machine "to see if they are up to specifications" (R. 68-69); "if the color appears correct, or the print appears correct, then the goods will be assorted to the various colors and shipped" (R. 68).

5. *Cornelia Mills, Inc.* This tenant, occupying an entire floor of the premises throughout, represented four or five upholstery fabric mills in Rhode Island, North Carolina, Pennsylvania and New Jersey (R. 75), and used the leased space to warehouse part of the mill "stock of piece goods" (Pl. Ex. 7, R. 184; R. 76-79, 87-90).

The usual inventory maintained ran to 100 to 200 bolts of goods, of which several pieces were shipped out each day (R. 79-80); all materials were received throughout from out-of-state sources of supply (R. 80). Some 60% to 70% of shipments from the premises went to customers outside the State of New York (R. 81-88). During the greater part of the period in suit the annual dollar volume of business of the firm ran between $500,000 and $600,000, of which $75,000 to $120,000 was received at and shipped from here (R. 79, 85, 88); of 18 to 24 shipments daily at least 15 or 20 would represent goods received and shipped out *in the same day* (R. 90).

The firm customarily received its merchandise in rolls or cartons, mostly wrapped in paper. Four shipping clerks were employed to check, examine, assort, repackage, reship the goods (R. 81). Occasionally, bolts were measured out and cut into smaller pieces; the tenant used a large cutting table for this purpose (Pl. Ex. 3, R. 81, 85-86). A Merrill binding machine provided the tenant with the means to bind 27-inch squares with small swatches in color variation stretched across the top of the larger sample for distribution to customers (Pl. Ex. 2, R. 82, 85). Sample materials were cut from bolt goods on the

premises daily by use of this machine and sent out by mail or parcel post to customers (R. 83-84).

6. *Arthur Kahn Co., Inc.* This tenant manufacturer was a cotton goods converter, renting space for showroom, stockroom and shipping room on the seventh floor and for storage of piece goods on the eighth (R. 90-91, 94). The tenant purchased cotton goods in the greige and ordered them sent to various finishing plants, received them back and shipped them from here to customers throughout the United States in 40 different garment and textile lines (R. 92). The firm dealt with dye houses and finishing plants located in various states where the goods were bleached, dyed and otherwise finished according to instructions sent from the premises (R. 92-94).

Customers visited the New York office daily to place orders (R. 94-95). Materials received from dye houses and finishing plants were sometimes placed in stock, from which they were then packed and shipped to customers, and sometimes shipped out again in the original packages. Sometimes the old wrappings were used and readdressed; on other occasions the cases were opened, the individual bolts taken out and repacked and the package addressed to the customer and delivered to the truckman for shipment (R. 96). This work was done by three shipping clerks (R. 97). The firm's gross sales between October of 1938 and April of 1942 were $3,000,000 to $4,000,000, or an approximate annual volume of $1,000,000 (R. 96). Of this sum 80% to 90% was delivered regularly to customers outside the State of New York (R. 96). Several shipments were made each day to out-of-state points (R. 97).

Equipment maintained by this manufacturing tenant included a Scott yarn tester, a cutting machine, scales; measuring and examining machines used to examine bolt goods for imperfections prior to shipment; pinking machine used to make zigzag edging in samples to avoid raveling; and a strapping machine to attach iron straps and a clipping machine to clip wire bands around cases being made ready for ship-

ment (Pl. Ex. 4; R. 99-102). Samples were made up and sent out all over the United States several days weekly (R. 100-101).

7. *William T. Bryan & Co.* This manufacturing jobber purchased linen piece goods, gave the material out to contractors to be made up into handkerchiefs, received back the product and, after sorting, top-pressing and boxing operations at 444 Fourth Avenue, shipped out the finished boxed handkerchiefs to customers throughout the United States (R. 102, 104-105). Raw materials were supplied to five contractors in the State of New Jersey (R. 103); the latter received detailed instructions with respect to the manufacture from the tenant here (R. 106). About 90% of the gross volume of sales was shipped from the premises, and only 10% from the contractors' shops in New Jersey (R. 103, 105, 107).

This manufacturing tenant used to receive the goods from contractors in wooden cases, unpack them, fold them, press them with electric irons, box them, store them and ship them to customers (R. 104, 106). Initials were added by machine at the contract plants, but the handkerchief sets were matched by initials at this building (R. 104). About 12 to 14 employees were regularly engaged in pressing and folding operations (R. 104, 107). The gross volume of business was $225,000 to $300,000 a year (R. 105) of which 85% represented sales and shipments to out-of-state customers (R. 105).

8. *George B. Robinton.* A mill representative and wholesale distributor of textiles and accessories for the corset and brassiere industries, this tenant did two-thirds of its business as selling agent storing and shipping merchandise for nine mills outside New York State and three within the state (R. 107-108). About 25% of the stock carried here was received from sources of supply outside of New York State (R. 114) and shipments for the various mills were about evenly distributed between those sent outside New York State and those within (R. 109). The remaining one-third of the tenant's business repre-

sented goods sold from stock carried on hand here and shipped to fill accumulating orders (R. 109-110). Additional sales from stock carried for the account of one of the mills represented, added to the latter business, brought total sales from stock to fill orders up to about 50% of the total dollar volume of the firm's annual business (R. 109). About 25% of the stock was received from sources of supply outside of New York State (R. 114).

The annual sales totaled about $350,000, of which interstate shipments from the premises approximated $35,000 per year, 10% of the total annual business of all types, or 20% of the total annual business representing goods physically passing through the building stockrooms (R. 109, 111, 114). Shipments to customers outside the State of New York were made from there daily (R. 111). Packages received from finishing plants and mills were broken up into smaller lots and distributed to fill accumulated orders from customers (R. 110). For example, a single shipment might consist of 100 packages of 20 gross packed in large cartons, 5 gross to the package; the cartons were broken up and the individual 5-gross packages repacked in other cartons and addressed and shipped to customers (R. 111-112). Any goods not immediately repacked and shipped were placed in stock to fill subsequent orders (R. 111).

9. *Pratt & Farmer Co.* This tenant leased space throughout for stock and shipping rooms from which it supplied, at wholesale, some 300 different types of "small wares", such as pins, needles and other items found on notion counters, to customers throughout the United States (R. 116-117). The average daily inventory of goods stocked at the premises approximated $40,000 (R. 116). Of an annual dollar volume of sales exceeding slightly the sum of $200,000, approximately 95% represented shipments from the premises to customers outside the State of New York (R. 117).

Merchandise handled by this tenant was received in large cartons and broken down into small indi-

vidual packages, which were set out on metal stock shelves; merchandise was then picked from stock to fill orders and repacked into cartons prior to shipment (Pl. Exs. 5 and 5A, R. 118). Two shipping clerks were regularly and continuously engaged in preparing orders for shipment (R. 118).

10. *Outlet Book Co.* The building also house the editorial offices and warehouse of a large book publisher and stock jobber (R. 125, 128). The publishing end of the business involved the reading and editing and preparing of manuscripts for the printer (R. 125). Free lance writers were interviewed and manuscripts purchased, or writers engaged to prepare particular material; the tenant also employed "house editors" to work on original anthologies or similar publications (R. 126). Staff editors forwarded manuscript copy to the printers, some of whom were located within New York State and others outside. Galley proofs were received from the printer, corrected and returned, ready for the final press-run. Books finished by the printer and binder were delivered to the premises and distributed from there to customers, 25% outside the State of New York (R. 126-127).

In addition, the tenant conducted at the premises a jobbing business consisting of purchase and wholesale sale of other publishers' stocks (R. 128). Of these books, 10% were acquired from publishers or dealers outside of New York State; and 25% were sold to customers outside New York State (R. 128). The total annual volume of business, including both the original Outlet publications and sales of other stock, approximated $500,000 a year (R. 127).

The firm employed six or eight employees in its shipping department regularly engaged in packing, boxing, wrapping and shipping books from stock carried on the premises (R. 127, 130). Books were shipped in individual cartons received knocked-down flat, set up by the shipping crew and books inserted (R. 129). Shipments were also made in case lots (R. 129-130).

11. *Samuel N. P. Gumbiner, Inc.* This manufacturer, converters of men's necktie fabrics, purchased yarn in raw state and ordered it shipped to mills to be woven into fabrics for sale to necktie manufacturers (R. 131). Weavers under contract with the company were located in New York and Pennsylvania (R. 131). Specifications were supplied to the weavers who, upon completion of the weaving, sent the fabrics to a dye house or finishing plant from which, in turn, they were shipped to 444 Fourth Avenue. Each bolt of goods sold by the tenant ultimately passed through these premises (R. 132).

This manufacturing tenant customarily made up designs for necktie fabrics on the premises and made out weaving instructions for transmittal to the various factories where the goods were turned out. The design sheet included 40 or 50 different lines with complete instructions as to the particular design and fabric to be made up. The number, color and quality of the various ties and the pattern into which they were to be woven was thus fully indicated (R. 135).

Merchandise as received from the finishing plants was opened and examined prior to packing for shipment to customers (R. 133). Goods received "unbolted" were examined by hand; piecegoods received rolled into bolts were placed in the measuring and examining machine and examined for flaws, then rerolled; pieces or bolts were thus examined out of each lot received (R. 133). The packages of materials supplied by the weavers and finishing plants were also sorted by color and style and placed into stock bins maintained in the leased space, then subsequently picked from stock, packed and shipped to customers throughout the United States (R. 132, 134). About 50% of the goods was sold from stock on hand; the remaining 50% was made up to order in the manner indicated (R. 134).

12. *Seminole Furniture Shops.* This wholesale distributor of furniture occupied space on both the second and eighth floors of the building throughout; a representative of the tenant described the latter

space as "the warehouse on the 8th floor" (R. 147-148).

About 90% of the furniture handled by this firm was received from out-of-state factories *earmarked and designated for specific customers* (R. 147). The furniture was generally held only while "waiting to be shipped out" to fill "prior orders" (R. 147). The annual volume of sales approximated $225,000, 90% of which went to customers within the State of New York, but on "prior orders" from out-of-state, and 10% to customers outside of New York State (R. 148). The average inventory value of furniture carried on the showroom floor approximated $30,000 (R. 152). Display pieces and showroom samples were frequently sold to customers, especially with changes in factory line or style (R. 152). No less than $100,000 to $125,000 of the annual volume represented furniture sold from the showroom floor each year (R. 152). Approximately 10% of this volume moved out-of-state (R. 153).

The eighth floor space included a workshop for polishing and repairing furniture. Each piece passed through this shop, where it was uncrated, examined by the finisher for marks or scratches, polished and repacked for shipment (R. 151). One employee worked regularly day in and day out in polishing and "occasionally a little cabinet work." He was "both a cabinet-maker and a finisher" (R. 152). This cabinet work included such jobs as repairing split joints, split sides or split legs, doweling with pegs, regluing, ledges, upholstery work (R. 155, 157-158). The facilities used in this work were similar to any cabinet workshop (Pl. Ex. 6, R. 158). All furniture sold from the showroom floor moved to the eighth floor workshop to be examined and placed in proper shape prior to shipment to customers (R. 158).

The remaining tenants for the most part conducted similar business activities at the premises. (Pl. Ex. 7, R. 183-185): The general character of this manufacturing

and warehouse building is perhaps best illustrated by the vast quantities of merchandise regularly moving in and out of the building in bulk shipments in commerce to and from the various leased work and storage spaces. Two freight elevators were maintained in continuous operation, one car being loaded while the other was in transit between floors (R. 136, 138). As many as 40 packing cases, or several hundred cartons, moved in and out daily on the freight elevators (R. 138). There were greige goods bales in shipments of 1,000 to 1,200 pounds each, individual cases of goods weighing from 300 to 600 pounds each, linens received in case lots measuring about 30 inches wide and 40 inches long and 28 inches deep; blanket goods moved in and out, wrapped in cartons the size of an ordinary barrel (R. 138-140). All of this merchandise passed back and forth to and from the tenants continuously on handtrucks moved in and out by a procession of expressmen, truckmen and shipping clerks (R. 27, 28, 35, 38, 43, 49, 67, 82, 87, 98, 105, 113-114, 119, 123, 128, 147, 154).

Statutory Provisions Involved

The relevant statutory provisions are Sections 3 (b), 3 (j), 7 (a) and 16 (b) of the Fair Labor Standards Act of 1938, which have been set out in full in petitioner's brief (Pet. for Writ pp. 10-11).

Question Presented

Concisely stated, the question presented is whether under the facts of the case plaintiffs were "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 and entitled to its benefits, where they worked as building service and maintenance workers in a building devoted almost exclusively by various tenants to manufacture, pro-

duction and distribution of goods. Petitioner presents the question in argumentative form, distorting the facts and pleading the conclusion desired (Pet. for Writ, pp. 6-7).

ARGUMENT.

I.

This case comes clearly under the doctrine of *Kirschbaum* v. *Walling*, 316 U. S. 517, and the decision of the Second Circuit was not in conflict with any decision of this Court.

Petitioner's principal argument is that the Second Circuit ignored the holding in *10 East 40th St. Bldg. Inc.* v. *Callus*, 65 Sup. Ct. 1227, to the effect that:

> An office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer.

The fact is that the Second Circuit expressly recognized the differences alluded to by this Court and correctly decided the case at bar under the doctrine of *Kirschbaum* v. *Walling*, 316 U. S. 517. Thus, the Circuit Court's opinion, after analyzing the activities of the various tenants relied upon in reaching the result, summarizes:

> The concerns here included in our computation are *all manufacturers*, and their employees *on these premises* were engaged in production. (Emphasis supplied.)

Further, this building was a composite manufacturing and warehousing building, housing numbers of tenants engaged in processing, jobbing, storing, packing and shipping

goods; but one or two out of thirty-five were not so engaged (see Pl. Ex. 7, R. 183-185). Thus, while the proportion as between tenant manufacturers and tenant warehousers and wholesale distributors may have varied somewhat, the general class of tenancies was exactly the same as in *Kirschbaum* v. *Walling,* and all were as clearly engaged in "production" under the Act. As the facts in the latter case were summarized by Mr. Justice Frankfurter,

> Practically all of the tenants manufacture *or* buy and sell ladies' garments. (Emphasis supplied.)

Those who did not manufacture in the *Kirschbaum* case were distributors who bought and sold goods, stored them in the building and packaged and shipped them from there.* But the 444 Fourth Avenue building tenants virtually all either stored, packaged, graded, examined for flaws and boxed textiles or yarns; warehoused furniture; set type and cut paper stock for multigraph printing; sent out piecegoods to contract shops and received finished textiles and textile products from contract shops, bleacheries, mills and dye houses; pressed, assorted, finished and boxed handkerchiefs; stored hundreds of different types of small goods of various sorts; engaged in all the activities of a great publishing business, including the warehousing, boxing, wrapping and shipping of books as received from the presses; and performed similar operations resulting in the movement by carrier in and out of the stream of commerce daily through the building's facilities of vast quantities of goods of an aggregate annual volume of close to $4,000,000. Under the circumstances, it is sheer sophistry for petitioner to urge that because the tenants here were finishers of linens and furniture, rebuilders of cash registers and

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* See finding 4, R. 326, Opinion, R. 332, No. 924, Oct. Term, 1941; Pl. Ex. 25, R. 316-318, No. 924, Oct. Term, 1941.

refrigerators, converters of cotton goods and textiles, printers of advertising matter, the result cannot be controlled by *Kirschbaum* v. *Walling* where most of the tenants were *clothing* manufacturers. As a matter of fact many of the tenants in the *Kirschbaum* case, like many of those here, were manufacturing jobbers designing and sending raw materials to be made up in outside contract shops and distributing the finished product.*

It requires but little to demonstrate that *10 East 40th St. Bldg. Inc.* v. *Callus* did not hold, as petitioner contends, that the preparation of advertising and printed matter and the warehousing, repacking and shipping of goods, are not "production" within the meaning of the Act. The majority opinion in that case, as in *The Borden Co.* v. *Borella*, 65 Sup. Ct. 1223, refrained from expressing any view whatever on this point; and in the latter decision, the Court stated specifically that there was "no occasion to express our views on this matter" (fn. 3). The majority opinion in the *10 E. 40th St.* case certainly did not by silence hold what petitioner urges here. It seems reasonable to assume that this Court found it unnecessary in the *10 E. 40th St.* case to decide the question whether there was physical production of goods carried on in the office building there involved because not enough of the building was devoted to such physical production to establish the necessary close relation of maintenance employees to such production. The record shows there that only about 6% to 7% of the building was occupied by tenants engaged in actual physical preparation and handling of goods. As a matter of fact, the employees' position in the *10 E. 40th St.* case was pitched essentially upon the contention that the building housed a substantial number of administrative and executive offices of manufac-

* See R. 156-164, 178-181, No. 924, Oct. Term, 1941; Pl. Ex. 25, R. 316-318, No. 924, Oct. Term, 1941.

turers *elsewhere* engaged in production, and the Court decided the case against the employees specifically upon this contention and did not decide that the finishing, packing and shipping of goods at producers' premises in a storage warehouse building was not "production" as defined.

But in any event, as the Second Circuit here found, activities in the building at bar included to the extent of about 40% manufacturing and production on the premises, and the result was in accord with the doctrine laid down in *Kirschbaum* v. *Walling* and the broad language of *Western Union Tel. Co.* v. *Lenroot*, 323 U. S. 490. In the instant case, therefore, so much of the space was devoted to activities constituting clearly *direct production in the building within the purport of these cases* that the Second Circuit necessarily properly resolved the issue in favor of the employees. The Circuit Court might, if it chose, have made even a clearer case for coverage. For actually, as will presently appear, virtually *all* of the building was so devoted, and the Circuit Court gave the petitioner the benefit of every doubt in excluding the activities of the balance of the tenancy, consisting of wholesale distributors also engaged in physical "production" of goods in the building under the language of the *Western Union* case.

II.

If *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, was misconstrued by the Second Circuit, it was clearly misconstrued to the advantage of petitioner.

Accurately construed, *Western Union* v. *Lenroot* supports the conclusion that virtually all of the building in the case at bar was occupied by tenants who used the space for the *physical production of goods directly in the building prior to shipment by carrier into channels of interstate*

commerce. Thus, under the *Western Union* decision, "one who packages a product • • • or performs any number of tasks incidental to preparing for shipment" would seem to be engaged in production, *whether he be a manufacturer or not.* The *Western Union* decision clearly excludes from the scope of the term "production of goods" only such "handling in carriage or transmission in commerce" as actually constitutes the physical movement of the subject of commerce *by the carrier* in the stream of commerce between states; in contradistinction, by express language "production" is held to *include* "all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce". Under the *Western Union* decision, therefore, there appears to be no basis for the Second Circuit's somewhat timid concern lest it extend the definition of "production" to wholesalers handling purchased goods and sorting and repacking them for shipment to others. Obviously, if application of the doctrine of *Western Union* v. *Lenroot* affected the decision of the Second Circuit here at all, it affected it adversely to respondents. The misconstruction thus *benefited* petitioner and petitioner may hardly be heard to complain. Correctly interpreted, the decision would have indicated that virtually the entire building here was devoted to manufacturing, warehousing and physical distributive functions constituting "production" within the meaning of the Fair Labor Standards Act, bringing these employees within its protection under the doctrine of *Kirschbaum* v. *Walling.* There was, then, an even clearer case for extending respondents the Act's benefits than the Second Circuit apprehended.

III.

There was no conflict between the Second Circuit's rejection of petitioner's contentions and the decision of any other Circuit Court of Appeals.

Petitioner implies (compare Pet. for Writ, p. 7) conflict between the decision of the Second Circuit rejecting its contentions and the various Circuit Court decisions in office building cases apparently regarded favorably by this Court in arriving at the result in *10 E. 40th St. Bldg. Inc.* v. *Callus* (compare Pet. Br., p. 27). These cases have no bearing here, for none of them involved a manufacturing and warehouse building. Petitioner ignores the fact that its building is a *"loft building"*, by classification for wage purposes under collective agreement, and *not* an office building.

Further, all Circuit Court decisions touching the question hold that inclusion within the definition of "production" in Section 3 (j) of "handling or otherwise working upon" goods extends the concept to warehousing and wholesale distributive activities and to distribution of goods previously fully manufactured. *Bracey* v. *Luray,* 138 F. (2d) 8 (C. C. A.); *Mutual Wholesale Food & Supply Co.* v. *Walling,* 141 F. (2d) 331 (C. C. A. 10); *Phillips* v. *Star Overall Dry Cleaning Laundry Co., Inc.,* 149 F. (2d) 416 (C. C. A. 2). Compare *Walling* v. *Sondock,* 132 F. (2d) 77 (C. C. A. 5), cert. den. 318 U. S. 772; *Fleming* v. *Jacksonville Paper Co.,* 128 F. (2d) 395, 398 (C. C. A. 5), affd. 317 U. S. 564; *Fleming* v. *American Stores,* 42 F. Supp. 511, 524, affd. 133 F. (2d) 840 (C. C. A. 3). The Second Circuit has itself applied this principle in building service cases. *Fleming* v. *Post,* 146 F. (2d) 441; *Gangi* v. *Schulte,* 150 F. (2d) 694; *Schmidt* v. *Emigrant Industrial Savings Bank,* 148 F. (2d) 294; compare *Borella* v. *The Borden Co.,* 145 F. (2d) 63, affd. 65 Sup. Ct. 1223. And while the Second

Circuit apparently overlooked the holding in the first of these in *accepting petitioner's contention* that activities of independent wholesale distributors in handling goods do not constitute "production", it is axiomatic that petitioner has no complaint on that score. *Blumenthal* v. *Gerard Trust Co.*, 141 F. (2d) 849 (C. C. A. 3) held nothing different. There a janitor in an apartment house building was of course denied recovery under the Act.

IV.

There is no occasion to review the decision of the Second Circuit here because of any particular importance of the question involved.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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